IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT L. AUERBACH, M.D.	:	CIVIL ACTION
	:	
v.	:	NO. 01-CV-854
	:	
KANTOR-CURLEY PEDIATRIC ASSOCIATES, P.C., ET AL.	:	

MEMORANDUM & ORDER

SURRICK, J. **DECEMBER 30, 2004**

Presently before the Court is Plaintiff Robert L. Auerbach, M.D.,'s ("Plaintiff") Motion for Reconsideration of our Memorandum and Order (Doc. No. 29) granting summary judgment in favor of Defendants Kantor-Curley Pediatric Associates, P.C. ("Kantor-Curley"), James G. Kantor, D.O., and John F. Curley, D.O., with respect to Count III (breach of contract) and Count IV (fraud) of the Complaint.[1] (Doc. No. 30.) For the following reasons, Plaintiff's Motion will be denied.

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(g) permit parties to file motions for reconsideration or amendment of a judgment. *Spence v. Acosta Sales & Mktg. Co.*, No. 03-1437, 2004 U.S. Dist. LEXIS 20062, at *1 (E.D. Pa. Sept. 29, 2004). Courts should grant these motions sparingly, reserving them for instances when (1) there has been an intervening

[1] We also granted summary judgment in favor of Defendants on Counts I and II of the Complaint, which alleged violations of the Employee Retirement Income Security Act ("ERISA"). (Doc. No. 29 at 1, 13-15.) Plaintiff's Motion does not seek reconsideration of these decisions.

change in controlling law, (2) new evidence has become available, or (3) there is a need to correct a clear error of law or fact or to prevent manifest injustice. *General Instrument Corp. v. Nu-Tek Elecs.*, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), *aff'd*, 197 F.3d 83 (3d Cir. 1999). Rule 59 motions are not appropriate vehicles "for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998); *see also* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995) ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment.").

Initially, Plaintiff argues that this Court committed a "manifest error of law" in concluding that the parties' actions after the expiration of the last written amendment to the Employment Agreement between Plaintiff and Defendants did not qualify as a renewal of the agreement for an additional fixed term. (Doc. No. 30 at 1-6.) Plaintiff asserts that "there was substantial evidence in the record from which a jury could find that the new contract was a renewal, and that it was error for the court to make a factual finding that the new contract was at-will and enter summary judgment on its finding." (*Id.* at 2.) Plaintiff attempts to support this argument by pointing to several pieces of evidence, including (1) deposition testimony by Barbara Thompson, an employee for Kantor-Curley, regarding statements allegedly made by Dr. Kantor that the contract with Plaintiff remained in effect despite the absence of an amendment (Thompson Dep. at 25), (2) an affidavit by Robert Emery, a former employee of Kantor-Curley, that alleges Dr. Kantor and Dr. Curley made oral representations to him similar to those that Dr. Kantor allegedly made to Dr. Auerbach (Emory Aff. ¶¶ 3-5), and (3) a letter from Defendants'

counsel to Dr. Kantor regarding the expiration of the final amendment to the Employment Agreement in September, 2000, and Dr. Auerbach's status as an employee after the amendment's expiration (Doc. No. 27 Ex. Z.). It therefore appears that Plaintiff is asserting that these statements create a genuine issue of material fact as to whether the employment contract had been renewed, and that summary judgment therefore was not appropriate under Federal Rule of Civil Procedure 56(c). We note, however, that Plaintiff did not assert the existence of a genuine issue of material fact in his initial Brief Regarding Summary Judgment (Doc. No. 27). In that memorandum, Plaintiff's position was that the "*undisputed facts* compel a determination that defendants are liable on all counts." (*Id.* at 3 (emphasis added).)[2] If Plaintiff truly believed that there was a genuine issue of material fact, he was obligated to raise that argument in his initial summary judgment memorandum. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) ("[W]hen a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" (quoting Fed. R. Civ. P. 56(e)) (footnote omitted)). We will not grant Plaintiff a "second bite at the apple," *Sequa Corp.*, 156 F.3d at 144, for his belated attempt to assert that an issue of material fact exists after failing to prevail on summary judgment.

Next, Plaintiff argues that this Court committed an error of law when we determined that the parties' objective actions demonstrated that they did not intend to renew their contract. (Doc.

[2] We similarly noted in our March 22, 2004, Memorandum that "[t]he parties agree that there is no material dispute of fact," and that both sides argued that they were entitled to summary judgment as a matter of law. (Doc. No. 29 at 1-2 n.2.)

No. 30 at 2-4.) In support of this argument, Plaintiff cites to a trio of Civil War era cases[3] that allegedly give rise to a "strong presumption" that an expired employment contract is automatically renewed for another fixed term if the parties continue performance under the terms of the existing contract after the contract's expiration. We rejected this precise argument in our Memorandum and Order for several reasons. First, we distinguished this case from the "renewal presumption" theory advanced by Plaintiff. We noted that "[t]he renewal presumption exists for those employer-employee relationships in which the earlier contract expires and the parties never manifest their intent to each other and merely continue to act as they had before." (Doc. No. 29 at 11-12.) We explained that the situation in this case differed because the parties had engaged in affirmatively acting to amend the contract each time it expired, rather than passively continuing their prior relationship. (*Id.*) Second, we noted that each amendment "did not simply extend the term" of the prior contract, but instead "changed [its] financial terms . . ., sometimes increasing Plaintiff's pay." (*Id.* at 12.) In order to change these contractual terms, the parties had to negotiate, thus defeating the "renewal presumption" asserted by Plaintiff. Plaintiff's Motion for Reconsideration merely reiterates his prior summary judgment argument regarding the "renewal presumption." (Doc. No. 27 at 13-19.) Accordingly, this argument must be rejected.

Finally, Plaintiff asserts that this Court made a "manifest error of law" in concluding that because Plaintiff had produced no evidence that he suffered a legally cognizable injury in relying on Defendants' alleged misrepresentations, he could not establish a claim of fraudulent or intentional misrepresentation. (Doc. No. 30 at 6-10.) Again, we disagree. To establish the tort

---

[3] *Buckley v. Garrett*, 47 Pa. 204 (1864); *Wallace v. Floyd*, 29 Pa. 184 (1857); *Good Intent Co. v. Hartzell*, 22 Pa. 277 (1853).

of fraudulent or intentional misrepresentation, Pennsylvania law requires that the plaintiff prove "by *clear and convincing evidence* . . . (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Feeney v. Disston Manor Personal Care Home, Inc.*, 849 A.2d 590, 597 (Pa. Super. Ct. 2004) (emphasis added). Given Plaintiff's status as an at-will employee after the expiration of the final amendment to the employment agreement, as discussed above, the only legally cognizable injury that he could have suffered would have been foregoing other job opportunities in reliance on the alleged misrepresentation. *See Clay v. Advanced Computer Applications, Inc.*, 536 A.2d 1375, 1384 (Pa. Super. Ct. 1988) (noting that "foregoing other employment opportunities" is a detriment that employees may "incur in reliance upon their employment" (citing *Veno v. Meredith*, 515 A.2d 571, 580 (Pa. Super. Ct. 1986))). In this case, Plaintiff has not claimed that he declined to pursue any job opportunities because of the asserted misrepresentations, nor has he presented evidence that any such opportunities existed. (Doc. No. 29 at 16.) Consequently, summary judgment was appropriate on this claim. *See, e.g.*, *Yerger v. Landis Mfg. Sys., Inc*, No. 88-7694, 1989 U.S. Dist. LEXIS 6800 (E.D. Pa. June 16, 1989) ("There is simply no evidence of record from which a jury could reasonably conclude that [plaintiff] relied to his detriment on the defendants' misrepresentations. A jury cannot be allowed to speculate on whether there were available to plaintiff other suitable employment opportunities, whether he would have obtained some unidentified position, and if so, how much he would have been paid. . . . Plaintiff has failed to establish that any genuine issue exists regarding his reliance on defendants' misrepresentations and any resulting damages."); *Engstrom v. John Nuveen & Co.*, 668 F. Supp. 953 (E.D. Pa. 1987) ("[M]erely failing to seek other employment is not detrimental reliance . . . . [Plaintiff] must

present sufficient evidence from which it could reasonably be found that [he] refused offers of comparable work and relied on the alleged promises of employment . . . to his detriment . . . .").[4]

For these reasons, Plaintiff's Motion for Reconsideration will be denied.

An appropriate Order follows.

[4] Plaintiff asserts that this Court erred in relying on prior federal court decisions in this District that apply Pennsylvania law. (*See* Doc. No. 30 at 6 ("Pennsylvania law governs the fraud claim, and decisions of the federal courts are not the law of Pennsylvania and are not binding on Pennsylvania courts.").) Plaintiff, however, does not present any evidence that Pennsylvania law has reached a contrary result on this issue, and a prior federal court construction of state law may be relied upon in the absence of a supervening state court interpretation. *See Spencer Boat Co. v. Liutermoza*, 498 F.2d 332, 333 n.3 (5th Cir. 1984) ("[F]ederal court construction of state law is to be relied upon . . . in the absence of supervening state court interpretations . . . ."); *see also Lesnefsky v. Fischer & Porter Co., Inc.*, 527 F. Supp. 951, 954 (E.D. Pa. 1981) ("When an issue is presented and applicable state precedent is absent, Federal courts must predict the law of the state." (citing *Gerr v. Emrick*, 283 F.2d 293, 294 (3d Cir. 1960))).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT L. AUERBACH, M.D.	:	CIVIL ACTION
	:	
v.	:	NO. 01-CV-854
	:	
KANTOR-CURLEY PEDIATRIC ASSOCIATES, P.C., ET AL.	:	

ORDER

AND NOW, this 30th day of December, 2004, upon consideration of Plaintiff Robert L. Auerbach, M.D.,'s Motion for Reconsideration (Doc. No. 30), and all papers filed in support thereof and in opposition thereto, it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge